COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

2010/CLE/gen/01011

BETWEEN

IN THE MATTER OF an Application by Point House Corporation Against Peter Nygard For an Order of Committal Pursuant to Order 52 of The Rules of The Supreme Court

PETER NYGARD

Plaintiff

AND

POINT HOUSE CORPORATION

First Defendant

AND

LOUIS BACON

Second Defendant

Before: Stephen G. Isaacs J.

Appearances: Koed Smith for Plaintiff
Robert Adams and Michaela Ellis with him for First Defendant

Hearing Date: 17 and 19 September 2012

D E C I S I O N

On 9 August 2012 leave was granted to the First Defendant (Point House) to commence committal proceedings against the Plaintiff (Nygard) for breach of a solemn undertaking given to the Court, as described by Donaldson M.R. later in this decision, to preserve the status quo in circumstances that are detailed below. The hearing was fixed for 4 September 2012, and on 15 August the Court granted leave to Point House, ex parte, to serve process on Counsel for Nygard. The Notice of Motion filed on 9 August 2012 provides

TAKE NOTICE that this Honourable Court will be moved before The Honourable Mr. Justice Stephen Isaacs, sitting at The Supreme Court Building, Nassau, New Providence, on Tuesday the 4th day of /September A.D. 2012 at 10:00 o'clock in the fore-noon, or so soon thereafter as counsel can be heard, by Counsel on behalf of the First Defendant, FOR AN ORDER THAT (i) the Plaintiff, Mr. Peter Nygard, be committed to Her Majesty's Prison at Fox Hill on the Island of New Providence for contempt of court in committing several breaches of the undertaking given, through his Counsel, to this Honourable Court at the hearing held on 13 June 2012; (ii) Such further or other Order be made as may seem just to the Court and (iii) The costs of this application be paid by Mr. Peter Nygard and taxed, if not agreed.

AND FURTHER TAKE NOTICE that the grounds of this application are that:

(1) At the hearing held before The Honourable Mr. Justice Stephen Isaacs in this Action on 13 June 2012, PETER NYGARD, through his Counsel, gave an undertaking to this Court, and, to First Defendant in the face of this Court, that he would (i) immediately remove the words "TO NYGARD CAY" which were painted by the Plaintiff's agents on the roadway, (ii) refrain from affixing any further signs of any kind on the roadway and (iii) maintain the status quo by making no further alterations to the state of the roadway area pending the hearing and determination of the Plaintiff's Summons filed on 7th June 2012 and First Defendant's Summons filed on 12th June by this Honourable Court on 4th September 2012.

(2) On 18th June 2012, however, PETER NYGARD, through his servants and agents, altered the roadway area by removing several coral stones and destroying certain plants owned by the First Defendant which had been situate along the side of the roadway for over 5 years ago *(sic)* prior to the hearing at which the said undertaking was given.

(3) Also, on 19th June 2012, PETER NYGARD, through his servants and agents, altered the roadway area by elevating the gradient of the roadway area in the front of the entrance gate to Nygard Cay by laying an additional layer of asphalt on the same despite the terms of the undertaking.

2. This action was commenced on 22 July 2010 by a specially indorsed Writ of Summons seeking specific orders relative to rights that Nygard claims to have over an easement which crosses the land of Point House. These alleged rights can be characterized, as I understand the prayer, as a right to estop the Defendants by themselves or their agents from accessing or utilizing the roadway in a manner inconsistent with that of Nygard; and a right to redesign and

reconstruct the roadway to reflect its original location, shape and gradient at the expense of the Defendants.

3. On 4 June 2012 Point House filed an Ex Parte Summons under RSC O.29 r.1 for an order that, *"until the final determination of the issues in this Action or until further order, the Plaintiff his agents and employees or otherwise (i) remove forthwith all of the signs bearing the words "NYGARD CAY" which were affixed to the premises of the First Defendant on Thursday, 21 May 2012 without the consent of the First Defendant and (ii) repair or re-instate the roadway marking bearing the words "PRIVATE" which were defaced by the use of black spray paint on Thursday, 31 May 2012 without the consent of the First Defendant."*

4. On 6 June 2012 the order sought by Point House was granted as prayed. On 13 June 2012 on an application under the liberty to apply clause, Nygard sought to set aside the Ex parte Order. At that hearing a trial date was set for 5, 6 and 7 February 2013, all outstanding interlocutory applications were adjourned to 4 September 2012 and Counsel were directed to craft an order preserving the status quo until the hearing of those interlocutory applications.

5. What transpired after 13 June 2012 grounded the application to apply for the committal of Nygard and is described by Ian Levy in three Affidavits filed 28 June, 19 July and 1 August 2012 in the following language:

> *Ground No. 1*
>
> *On 18th June 2012, Mr. Nygard, through his servants and agents, altered the roadway area by removing several coral stones and destroying certain plants owned by the First Defendant which had been situate along the side of the roadway for over 5 years ago (sic) prior to the hearing at which the said undertaking was given;*
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> *Ground No. 2*

On 19th June 2012, Mr. Nygard, through his servants and agents, altered the easement by elevating the gradient of the roadway area in the front of the entrance gate to Nygard Cay by laying an additional layer of asphalt on the same despite the terms of the undertaking;

Ground No. 3

On 14th July 2012, Mr. Nygard, through his servants and agents, cut away, removed and destroyed the gates owned by the First Defendant despite the terms of the undertaking;

Ground No. 4

On 31st July 2012, Mr. Nygard, through his servants and agents, caused several large coral stones to be placed on a section of the roadway which crosses over land owned by the Second Defendant despite the terms of the said undertaking"

6. At the substantive hearing on 4 September 2012 both parties intimated that they wished to attempt a resolution of the matters complained of and the hearing was adjourned to 17 September 2012. Nygard was not present on the adjourned date, nor was there any Affidavit evidence disputing the conduct described in the Levy Affidavits. Indeed Mr. Smith made the curious statement on an enquiry by the Court that Nygard acted on his legal advice. I expect that Mr. Smith advised Nygard of the nature and meaning of the undertaking given on his behalf. For accuracy page 18 line 27 to page 19 line 15 of the transcript of 19 September 2012 is a record of the exchange between bench and bar on this point as follows:

"MR. SMITH: Yes, my Lord. The position, which I wish to covey, as best as I can, from my posture now, is that certain things were indicated, in due course, to the Plaintiff, with respect to what was expected, coming out of the hearing, on the 13th.

THE COURT: So, are you taking responsibility for the Plaintiff's actions?

MR. SMITH: Well, I don't know if I can do that, my Lord.

THE COURT: Well, you said certain things were indicated. Does that mean he was advised?

MR. SMITH: He was advised with respect, my Lord, to what we knew was being undertaken to the Court, which was signage to be move. No signage to be placed.

THE COURT: Okay.

MR. SMITH: And then when it comes down to, as far as speed bumps were concerned --

THE COURT: Okay.

MR. SMITH: Speed bumps were not supposed to be replaced."

I shall make no further comment on this issue as only Nygard can divulge his priviledged communications with his own Counsel. In any event, as will be seen later, following unsound advice is not a sufficient cause to prevent Nygard from being held in contempt.

7. Mr. Smith correctly submitted that Point House must prove the precise terms of the undertaking beyond a reasonable doubt as this is the standard of proof in civil committal proceedings. This principle was confirmed in ***Woolmington v DPP [1935] AC 462,*** and later seen applied in ***Dean v Dean [1987] FLR CA***.

8. Given the standard of proof required, Mr. Smith argued on behalf of Nygard at paragraphs 3.1.1 to 3.1.5 of his submissions that:

3.1.1 he denies giving the undertaking as set out in paragraph 1 above; and

3.1.2 the corollary of item (i) above is that he could not be in breach of the purported undertaking; and

3.1.3 he is in full compliance with the undertaking actually given on his behalf; and

3.1.4 the instant application being made by the Defendants is not legitimate and should be denied as the First and Second Defendants as well as the Affiant Ian Levy were always aware that the grounds advanced for the granting of leave to commence these proceedings, now set out in the Motion, are false, namely that:-

3.1.4.1 the undertaking given by Counsel for the Plaintiff was restricted to the terms of the Plaintiff's application being pursued by Summons filed herein on 19th March, 2012 and 7th June, 2012 in relation to the posting or painting of signs indicating that the roadway was an access to the residence of the Plaintiff although the Court ordered that cameras which were claimed to have been criminally disconnected by unknown persons could be reconnected by the Defendants; and

3.1.4.2 the Order setting out the terms of the undertaking, was never agreed by Counsel for the Plaintiff and the First Defendant; and

3.1.4.3 having regard to the confusion and the adduced evidence by the First Defendant as to the purported undertaking given by the Plaintiff, it does not reach the standard of being a firm conviction on the Plaintiff's part that an undertaking in the terms proffered by the First Defendant, was being given; and

3.1.4.4 the land referenced by the First Defendant in the 4th, 5th and 6th Supporting Affidavits of Ian Levy as being that of the First and/or Second Defendants, is actually not true; and

3.1.4.5 some of the acts which the First Defendant alleges the Plaintiff has contravened, are in relation to a private road reservation that is not subject of the pleadings in this action.

3.1.5 The undertaking in respect of which leave was granted is not the undertaking set out in the Motion in respect of which the Plaintiff is expected to answer the allegations.

9. In support of these submissions Mr. Smith referred to two Affidavits of Eric Gibson, his first filed 13 June 2012 and another filed 10 August 2012. The direction to craft an order preserving the status quo given on 13 June 2012 was never discharged as Counsel could not agree on the wording. Of course any such order would have to accurately reflect the undertaking alleged to have been breached.

10. Taken from the transcript are the following statements made by Mr. Smith which speak to the nature and extent of the undertaking, as well as to Nygard's knowledge of same

> ***"... nobody move at all on anything to do with the easement until the Court...have an opportunity to look at it and see of (sic) there is any basis for any kind of injunctive relief, or for the matter to be heard with the status quo remaining current as is"***
>
> ***"... Everything is moved. No road markings, no signs, nothing else is done one way or the other, parties try their best to work co-operatively with one another for the time being until the Court has an opportunity to finally determine. My Lord, the nature of my instructions are fine because I can say that we can agree to that at this point..."***
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> ***""I think, my Lord, if this position that we have talked about all ready, can be in place and it is clear, I am here and I have notice to advise my client. And if things stay the way think (sic) are and that we are able to say on essentially come on the 1st of August or whatever the date may be. And on the date of whatever in September, we will hear all of the applications at that time, all of the interlocutory applications."***

11. Further, by an e-mail of 13 June 2012 from Mr. Smith to Mr. Adams and exhibited to the Fourth Affidavit of Ian Levy as I.L.4, Mr. Smith confirmed to Mr. Adams that Nygard said he would attend to removing both of the roadway markings, and on 10 July 2012, Mr. Smith wrote to Mr. Adams in the following terms:

> ***"We write with reference to the captioned matter and the Court's order preserving the status quo in relation to the physical state and management of the right of way by both parties concerned."***

12. It seems clear that Nygard was made aware of the terms of the undertaking given to the Court on his behalf to maintain and preserve the status quo until 4 September 2012.

13. I note here that the letter of 10 July 2012 refers to a Court Order, but I hasten to underline the point that an undertaking was given by both sides to preserve the status quo. As no agreement was reached on the wording of an Order to accurately reflect the undertaking, no order was perfected.

14. In ***M v Home Office and others [1992] 4 AER 97, Donaldson M.R.*** said:

> ***"In ordinary circumstances, if a party or his solicitor or counsel acts so as to convey to the court the firm conviction that an undertaking is being given that party will be bound and it will be no answer that he did not think that he was giving it or that he was misunderstood.***

15. ***Cozene-Hardy J.*** held in ***D v A & Co [1900] 1 Ch 484*** that service of an order encapsulating an undertaking was not necessary. In the instant case Nygard had notice of the terms of his undertaking and is therefore bound to his undertaking.

16. Donaldon M.R. explained in ***Hussain v Hussain [1986] 1AER 961*** that an undertaking given by a party through his Counsel to the court is ... as solemn, binding and effective as an order of the Court in the like terms. Proof of service of an order containing the terms of an undertaking and proof of service of a penal notice are not essential pre-requisites to a committal order being made for contempt of court based upon a breach of an undertaking.

17. It follows that the fact that Mr. Nygard has not been personally served with a formal Order made upon the undertakings given on 13 June 2012 is not an impediment to this Court making a committal order in relation to him for committing a breach of the undertaking that he gave to the Court to preserve the status quo.

18. It appears also from the case of ***Re Agreement of the Mileage Conference Group of the Tyre Manafacturers Conference Ltd [1966] 2 AER 849*** that Mr. Nygards' reliance on legal advice is not an acceptable answer to an allegation of contempt of court. I might add that it is unlikely that Mr. Smith would have advised Nygard of anything without being requested to do so, and it is no defence to allegations of contempt of court where advice is found to be contrary to an undertaking. In other words Nygard would still be in contempt.

19. Mr. Smith's submission that Nygard had consent to raise the roadway is not supported by any evidence, and the argument that there was such consent is rejected for being irrational,

particularly as Point House is relying on that very act as one of its grounds for Nygard's committal.

20. Mr. Smith also submitted that the things done by Nygard as described in the series of Affidavits by Ian Levy ***"were not within the four walls of the undertaking"***. I fail to see the logic in this submission, for an undertaking to preserve the status quo would be rendered impotent were this submission to be accepted in the circumstances at hand.

21. The Writ itself complained of the gate at paragraph 14(g) and (h) and therefore issues pertaining to the gate are within the ambit of the undertaking as it is an issue to be resolved at trial. In this vain Mr. Smith made some brief submissions relative to the strength of Nygard's case, but I need not consider those submissions. As Mr. Adams correctly submitted at paragraph 34 of his submissions :

> ***"The mere fact that, in the interim, Mr. Nygard has formed the view that he has a sustainable claim cannot be properly advanced as a valid excuse for him, breaching the terms of the undertaking to maintain and preserve the status quo, to exercise the remedy of 'self-help' / 'abatement'.***

This principle is expressed by ***Green J.*** *when* said in ***Moffet v Brewer 1984 Iowa Rep (1 Green) 348*** as follows*:*

> ***"This summary method of redressing a grievance, by the act of an injured party, should be regarded with great jealousy, and authorised only in cases of particular emergency, requiring a more speedy remedy that can be had by the ordinary proceedings at law."***

I concur with Mr. Adams' submission that whether Nygard's claim is sustainable or not is a matter which this Court will consider after hearing all of the relevant evidence and legal arguments at trial

22. Mr. Smith clearly undertook on 13 June 2012 that nothing else would be done one way or another after the removal of the markings and signs. The Court itself expressed the undertaking given by both sides to mean that "in the meantime everything stays the same." That expression was not challenged. The letter from Mr. Smith to Mr. Adams of 10 July 2012 (*supra)* expresses Mr. Smith's understanding that both sides were under an obligation to maintain the status quo. The fact that alternate language was used in the Notice of Motion to that employed when the undertaking was given is of no moment so long as the undertaking itself remains clear beyond a reasonable doubt.

23. The steps taken by Nygard after 13 June 2012 cannot be characterized as a mistake in circumstances where he sought advice before hand. He broke a solemn obligation to the Court. If left unchecked, Nygard's conduct after 13 June 2012 would tend to erode public confidence that the judiciary shall subject all parties appearing before it to the rule of law. It matters not that a party passionately believes in his case, self help justice of the nature seen in this case must be stopped as a matter of urgency by the regulatory coercive powers of the Court.

24. Having considered the arguments of both Counsel I find that none of the technical issues raised by Nygard can assist him and that he is guilty of contempt to the requisite standard.

25. Given the prevailing circumstances, restoring the right of way to the condition it was in on 13 June 2012 is now an imperative as its condition is the very subject matter of the action. The Court has been moved to determine the rights of the parties relative to the use and physical structure of that right of way. To restore the integrity of the Court's process I hereby exercise my discretion and direct Point House to restore the right of way, as far as is practicable, to the condition it was in on 13 June 2012. The restoration includes, for the avoidance of doubt, the replacement of Point House's gates. The charges for labour and material that are properly invoiced are to be paid by Nygard within 14 days of his receipt of same.

26. In the result it is ordered as follows:

1. That the Contemnor stands committed to Her Majesty's Prison for a term of 30 days.

2. The term of imprisonment is not to be enforced and the Contemnor will have purged his contempt if he provides:

   (a) proof that he has paid a fine of $50,000.00 to the Public Treasury within 14 days of today's date and

   (b) he liquidates the restoration expenses incurred by Point House within 14 days of the presentation of the bill, vouched by invoices, for same.

3. Should the Contemnor fail to comply with this order and thereby purge his contempt within the times specified he shall stand committed to the said prison for a term of 30 days and a Warrant of Committal will be issued accordingly.

4. Costs of this application are awarded to Point House to be taxed if not agreed.

Dated the 8th day of September A.D. 2012

Stephen G. Isaacs J.